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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GLENN BROOKS,

Plaintiff and Respondent,

v.

WILLIAM DEAN DINOSO,

Defendant and Appellant.

G040885

(Super. Ct. No. 30-2008-00068489)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,  
Leon Emerson, Judge. (Retired judge of the former Mun. Ct. for the Downey Jud. Dist.  
of L.A. County, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)  
Reversed and remanded.

Printemps & Kaufman, Edwin Printemps and Nancy Kaufman for  
Defendant and Appellant.

The Law Offices of Patrick A. McCall, Patrick A. McCall and  
Marietta E. Raqueno for Plaintiff and Respondent.

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## INTRODUCTION

We hold the trial court erred in a civil harassment proceeding by denying defendant's request to offer live, relevant testimony at a hearing on an application for a restraining order, pursuant to Code of Civil Procedure section 527.6, subdivision (d).<sup>1</sup> Section 527.6, subdivision (d) states that after a temporary restraining order has been issued, and before a court may issue an injunction, the court "shall" hold a hearing at which the defendant will have the opportunity to offer relevant testimony on his or her behalf. Section 527.6, subdivision (d) has been so interpreted by *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719 (*Schraer*) and *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026 (*Nora*).

William Dean Dinoso appeals from a trial court order granting respondent Glenn Brooks's application for an injunction against him. At the hearing on the application, Dinoso stated he had a witness present and ready to testify. The trial court issued an injunction without giving Dinoso the opportunity to present the witness's testimony. Brooks does not contend the proffered testimony would have been irrelevant.

The trial court erred in issuing the injunction without permitting Dinoso the opportunity to offer live testimony.<sup>2</sup> Accordingly, we reverse and remand.

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<sup>1</sup> "Within 15 days, or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued, a hearing shall be held on the petition for the injunction. The defendant may file a response that explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint under this section. At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment. An injunction issued pursuant to this section shall have a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under this section." (Code Civ. Proc., § 527.6, subd. (d).) All further code references are to the Code of Civil Procedure.

<sup>2</sup> The order granting the restraining order against Dinoso is appealable pursuant to section 904.1, subdivision (a)(6). (See *Brydon v. City of Hermosa Beach* (1928)

## FACTS AND PROCEDURAL HISTORY

Brooks filed an application for a restraining order, “Request for Orders to Stop Harassment,” against Dinoso on May 14, 2008. On the same date, the trial court issued a temporary restraining order against Dinoso and set a hearing date.

The trial court heard the application for a three-year restraining order on June 27, 2008. At that time, counsel for Dinoso requested a conference in chambers to discuss whether Brooks’s counsel had a conflict of interest. After a discussion in chambers, Brooks’s counsel submitted a proposed restraining order.

The trial court stated, “I understand defendant is willing to stipulate to the restraining order.” Dinoso declined to stipulate and objected to two provisions in the proposed restraining order. This exchange ensued:

“[Dinoso’s counsel]: Your Honor, Mr. Dinoso is not willing to stipulate to any of the orders. And I need to put on a witness that will show who was the aggressor.

“The Court: Not willing to stipulate to what?

“[Dinoso’s counsel]: Mr. Dinoso will not stipulate to any of the orders. He’s requesting that the matter go forward to a hearing.

“The Court: Do you have anything further?

“[Brooks’s counsel]: No, Your Honor.

“The Court: Do you have anything further?

“[Dinoso’s counsel]: No, Your Honor.”

After Dinoso made this request for a hearing with witness testimony, the trial court granted Brooks’s proposed restraining order. As the court read the terms of the injunction on the record, Dinoso’s counsel objected:

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93 Cal.App. 615, 620 [“the intent of the statute is that all orders granting or refusing injunctions, whether temporary or permanent or provisional pending appeal, shall be appealable”].)

“[Dinosa’s counsel]: Excuse me, Your Honor. May I invite the court’s attention to the fact that you have denied Mr. Dinosa the hearing. He’s entitled to that under the 14th Amendment of the United States Constitution. The order is void.

“The Court: I asked you if you had anything further, and you said no.

“[Dinosa’s counsel]: I said he wouldn’t stipulate.

“The Court: Thank you very much, sir.”

The trial court issued the restraining order the same day, for the time period from June 27, 2008 through June 27, 2011. Dinosa timely appealed.

#### DISCUSSION

Dinosa contends that the trial court improperly denied his right to a hearing under section 527.6, subdivision (d). We agree.

We turn first to the plain language of the statute. Section 527.6, subdivision (d) states in relevant part: “[A] hearing *shall* be held on the petition for the injunction. The defendant may file a response that explains, excuses, justifies, or denies the alleged harassment or may file a cross-complaint under this section. At the hearing, the judge shall receive any testimony that is relevant, and may make an independent inquiry.” (Italics added.)

Two prior decisions interpreting section 527.6, subdivision (d) are directly on point. In *Schraer, supra*, 207 Cal.App.3d 719, 725, residential tenants obtained an injunction against a property owners’ association after a hearing at which the trial court refused to hear readily available oral evidence on the association’s behalf. The Court of Appeal held that where a party offers oral testimony from an available witness, the trial court must hear such testimony before rendering a decision on the petition for the injunction. (*Id.* at pp. 730-731.) In such cases, under section 527.6, subdivision (d), the trial court has no discretion to refuse to hear such testimony. (*Schraer*, at pp. 730-731.) As the court in *Schraer* noted: “[T]he procedure for issuance of an injunction prohibiting harassment is self-contained. There is no full trial on the merits to follow the issuance of

the injunction after the hearing provided by Code of Civil Procedure section 527.6, subdivision (d). That hearing therefore provides the only forum the defendant in a harassment proceeding will have to present his or her case. To limit a defendant's right to present evidence and cross-examine as respondents would have us do would run the real risk of denying such a defendant's due process rights." (*Id.* at pp. 732-733.)

More recently, in *Nora*, *supra*, 116 Cal.App.4th 1026, the court followed *Schraer*. In *Nora*, at the hearing on the petition for the injunction, counsel for both parties specifically requested the opportunity to present live testimony. (*Nora*, at p. 1028.) The trial court did not allow any testimony. (*Ibid.*) The appellate court found the refusal to permit live testimony violated section 527.6, subdivision (d). (*Nora*, at p. 1029.)

Here, as in *Schraer* and *Nora*, Dinoso's counsel specifically requested an evidentiary hearing as permitted under section 527.6, subdivision (d). As in *Schraer* and *Nora*, the trial court denied this request.

Dinoso requested an evidentiary hearing to call witnesses, as he was entitled to do under section 527.6, subdivision (d). First, Dinoso's counsel explicitly stated, "I need to put on a witness . . . . [¶] . . . [¶] . . . [Dinoso]'s *requesting that the matter go forward to a hearing.*" (Italics added.) Two other statements clarified Dinoso's request. At the beginning of the hearing, Brooks's counsel stated, "I don't know whether or not the intention [of Dinoso's counsel] is to call [Brooks's daughter] as a witness," to which Dinoso's counsel responded, "[i]f we proceed, I certainly do." These statements on the record demonstrate counsel's request for an evidentiary hearing. As the court read the restraining order into the record, Dinoso's counsel stood and objected on the ground that his client had been denied a hearing. When instructed to sit, Dinoso's counsel called the court's attention to the denial of Dinoso's right to a hearing.

Brooks argues that Dinoso failed to seize his opportunity to present testimony in two respects. First, Brooks contends that the trial court offered Dinoso a

hearing by asking “anything further?” immediately after Dinoso’s counsel made his request. Brooks argues Dinoso should have interpreted this question from the court as an open invitation to call his first witness. We disagree. The preceding discussion between the court and counsel centered on the potential conflict of interest involving Brooks’s counsel, Dinoso’s refusal to stipulate to the proposed restraining order, and Dinoso’s argument he should be allowed to present testimony under section 527.6, subdivision (d). Reasonable counsel could interpret “anything further?” as an inquiry as to whether either Brooks or Dinoso had further arguments to make in favor of or against allowing the testimony. Counsel could not be expected to interrupt the court by calling his witness as the court read the order into the record.

Second, Brooks argues that Dinoso could have submitted written testimony by filing “a response that explains, excuses, justifies, or denies the alleged harassment” (§ 527.6, subd. (d)), and Dinoso failed to do so. Section 527.6, subdivision (d) expressly states, “[t]he defendant *may* file a response” but “the judge *shall* receive any testimony that is relevant.” (Italics added.) “May” is permissive, while “shall” is imperative. Section 17, subdivision (a) defines “testimony” as encompassing “every mode of oral statement, under oath or affirmation.” The defendant has the option to file a response, but the court must accept relevant live testimony when offered. (§ 527.6, subd. (d).) Thus, the written response, as described in that section, is neither a prerequisite to nor a substitute for offering live testimony at the hearing. Section 527.6, subdivision (d) did not require Dinoso to file a written response to preserve his right to present live testimony, nor would filing a response necessarily have been an adequate substitute for live testimony.

Section 527.6, subdivision (d), along with the Court of Appeal’s prior decisions in *Schraer* and *Nora*, shows that where a defendant to an application for an injunction in a civil harassment proceeding offers relevant testimony on his or her behalf, the trial court must allow such testimony to be heard. The trial court denied Dinoso this

opportunity despite his timely request and the ready availability of a witness on his behalf.

We therefore conclude the denial of Dinoso's request for an evidentiary hearing and the rejection of his request to offer live testimony constitute a violation of his rights under section 527.6, subdivision (d).

In his respondent's brief, Brooks requested monetary sanctions in the amount of his attorney fees. As we are reversing, Brooks's request has no merit. Further, although the issue of monetary sanctions was discussed within the briefs, Brooks failed to file a motion for attorney fees and monetary sanctions. A request for sanctions must be made in the form of a motion. (Cal. Rules of Court, rule 8.276(a), (b)(1).) Accordingly, we would not consider Brooks's request. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1434; *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402; *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180.)

#### DISPOSITION

The order issuing the three-year restraining order against Dinoso is reversed and the matter remanded for further proceedings. Appellant to recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.